U.S. Department of Labor

Office of Administrative Law Judges
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CASE No.: 2001-ERA-19

VERNON BELT
Complainant,

v.

UNITED STATES ENRICHMENT
CORPORATION INCORPORATED,
Respondent.

Appearances:
John Frith Stewart, Esq.
Louisville, Kentucky
For the Complainant

Mark C. Whitlow, Esq.
Paducah, Kentucky
and
David M. Thompson, Esq.
Paducah, Kentucky
For the Respondent

Before: THOMAS F. PHALEN, JR.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under the employee protection provisions of the Energy Reorganization Act ["ERA"], 42 U.S.C. Section 5851. The implementing regulations that govern this matter appear at 29 C.F.R. Part 24.1-9. Such provisions protect employees from discrimination for attempting to carry out the purposes of the environmental statutes of which they are a part, and specifically for preventing employees from being retaliated against with regard to the terms and conditions of their employment for filing "whistleblower" complaints or for taking other action relating to the fulfillment of environmental

health and safety or other requirements of these statutes. The hearing, and this decision and order are also governed by those provisions, and the provisions of 29 C.F.R. Part 18.

On January 4, 2001, Mr. Vernon Belt filed a discrimination complaint under Section 211 of the Energy Reorganization Act. The complaint was investigated and, on April 18, 2001, was found not to have merit. On April 30, 2001, Complainant, through counsel, requested a formal hearing in this case. Pursuant to an order of the undersigned dated July 11, 2001, the hearing in this case was held on November 14 and 15, 2001 in Paducah, Kentucky. (ALJX 1-2)[1] The parties were represented by counsel and were given an opportunity to present evidence and arguments, and to file briefs in the matter. Briefs and reply briefs were timely filed by the parties. After considering all of the documentary and testimonial evidence, and the arguments and briefs of the parties, the following is my recommended decision and order, including the following issues, findings of fact and conclusions of law.

ISSUES

1. Whether the complaints of the Complainant were timely filed within the 180 day statute of limitations of the Act.

2. Whether Respondent committed adverse action against Complainant in response to protected activity under the ERA.

3. What damages and remedies, if any, the Complainant is entitled to as a result of the adverse actions taken by Respondent.

FINDINGS OF FACT

Stipulations**:**

The parties have stipulated and I find that**:**

1. The Office of Administrative Law Judges, U.S. Department of Labor has jurisdiction over the parties and the subject matter of this case.

2. Respondent is engaged in interstate commerce and is an employer subject to the provisions of Section 211 of the Energy Reorganization Act (hereinafter ERA of 1974. 42 USC § 5853.)

3. Complainant is now, and at all times material herein, a "person"as defined in §211

[1]References to the exhibits of the Administrative Law Judge, and the Joint, Complainant and Respondent exhibits, and to the official transcript will be designated, "ALJX", "JX", "CX", "RX" and "T" with the exhibit or page number following the designation.

of 42 USC, and an "employee" as defined in §211 of 42 USC .

4. Vernon Belt was an employee of USEC during the applicable periods in that he was employed as a fire protection engineer.

5. Pursuant to §211 of the ERA, Complainant Vernon Belt, filed a complaint dated December 29, 2000 with the Secretary of Labor alleging that USEC discriminated against him in violation of Section 211 of the ERA Act (42 USC § 5851).

6. Following an investigation, the Regional Administrator, Occupational Safety and Health Administration, issued findings on the complaint on April 18, 2001.

7. Complainant received those findings by mail on April 26, 2001.

8. Complainant mailed an appeal and request for hearing to the Chief Administrative Law Judge, U.S. Department of Labor, Washington, D.C. on April 30, 2001.

9. The appeal of the complainant satisfied the 30-day time constraints provided by 29 C.F.R. § 24.4.[2]

10. Complainant was hired by Respondent on March 15, 1976.

11. Complainant's employment ended effective July 14, 2000.

12. Subsequent to September 17, 1997 the Complainant engaged in protected activity.

13. Respondent was aware of Complainant's protected activity.

Background:

Complainant, Vernon Belt, herein called "Mr. Belt," "Belt" or "Complainant," was born on October 10, 1942, and was 59 years old at the time of the hearing. He was hired in March of 1976 as a Janitor at the Paducah Gaseous Diffusion Plant (PGDP) in Paducah, Kentucky, by the Lockheed Martin Utility Services (LMUS), predecessor to the United States Enrichment Corporation, herein called, " the Respondent," "the Employer" or "USEC,".[3] In 1997, USEC

[2]This stipulation does not resolve the timeliness issue regarding the 180 day limitation period for the filing of the original charge or complaint with the Occupational Safety and Health Administration. (OSHA).

[3]Notice is taken that in October of 1997, the company "Privatized" and USEC took over as a private, publicly held, company. The biggest change involved its accountability and how it worked. It was formerly accountable to the government and then, being a company in business for itself, accountable to the shareholders. The biggest change was managing a budget for a private business, to maximize the company's value to the shareholders. See, *Douglas Jones v.*

became subject to Nuclear Regulatory Commission (NRC) rules and regulations. USEC is, therefore, a "license holder" [a licensee] of the NRC, and is required to maintain certain standards for license certification. The production process is governed by numerous health and safety regulations including those of both the NRC and the Occupational Health and Safety Commission (OSHA).[4]

Recent changes in the uranium business, including depressed enrichment prices and decreased demand for uranium projected for the foreseeable future, have resulted in a series of budget curtailment measures. These have involved reductions-in-force (RIFs), both voluntary (VRIFs) and involuntary (IRIFs), that have either directly or indirectly affected Mr. Belt as well as the rest of the workforce over past few years.

Mr. Belt worked at the PGDC continuously for a total of 24 years, 7 months, until his July 2000 lay-off at issue in this case. Prior to that time, he had served as a fire fighter in Paducah for ten years, and as a construction worker just before his hire at PDGP. Before that, Belt also served four years in the Air Force as a mechanic with nuclear testing in the south Pacific.

Following military service, Mr. Belt obtained a GED from Murray State. He then earned an Associate Degree in Fire Science Technology at Paducah Community College (PCC), and a Bachelor's Degree in the Fire Service Management Program from Memphis State in May of 1989.

After his initial employment as a Janitor at PGDP in 1976, Mr. Belt worked there for two months and transferred to the Fire Division, where he served as a Fire Truck Driver for six or seven months. He then bid on a salaried Lieutenant position in the Fire Department and served as both a Fire Fighter and Fire Guard for three or four years. In 1989, his bachelor's degree resulted in a promotion to Fire Engineering Assistant (Senior), where he worked with all of the fire equipment, including the sprinkler systems

For a period of time, Mr. Belt was the only college "degreed" (his term) Fire Engineer employed at his level until another "degreed" Fire Engineer, Robert Wimbrow, was employed in the department in 1997. He replaced Belt's supervisor and remained in that position until May

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United States Enrichment Corp., 2001-ERA-21

[4]Notice is taken that Mined U235 uranium ore is initially converted from an oxide form into a uranium hexaflouride gas (UF6) at another location, and is transported to PGDP and a second USEC location at Portsmouth, Ohio. At PGDP the UF6 is "enriched" from 2% to 5% for use in nuclear reactors to produce energy. From there, the enriched UF6 is shipped in cylinders to a fuel fabricator where the metallic part of it, the enriched metallic uranium, is extracted and fabricated into fuel pellets in fuel rods for commercial reactors. The PGDP also receives some Russian uranium for blending and redistribution for commercial reactor fuel. See, *Douglas Jones v. United States Enrichment Corp*., *supra*.

1999, when John Smith became Operations Chief, or Fire Department Chief.[5] Wimbrow performed administrative duties, while Belt covered field operations. Belt ordered all fire equipment and assumed the Fire Alarm Systems Manager duties, including the annual inspection and follow-up on all of the 400,000 sprinkler heads in the various plant buildings as a one man operation.[6] He picked an area and inspected it to see that the sprinkler systems were clear and undamaged, examining all four quadrants annually, and making notes of deficiencies. I credit this statement that he then filed reports on those needing service, but did not do so immediately.

The 84 ATRs of 1999:

For the most recent protected activity claimed to have motivated his layoff, Mr. Belt described a circumstance that occurred over a period of time in 1999 when USEC changed the composition of the additives to the water in the plant due to an EPA directive. Basically, the chromate that had been added to retard growth of algae in the water cooling towers was removed at the direction of OSHA. That caused a reaction in the copper or brass "baskets" that sealed the "fusible link" on the sprinkler heads, which first resulted in slow leaks in the heads, and then caused the formation of softball sized "crustations" (corrosion) on the outside of the sprinkler heads. In May of 1999, after an inspection of several days revealed several such crustations, Belt filed 84 ATRs[7] at one time on the corrosion of 84 sprinkler heads. (CX 11)

Mr. Belt testified that he first approached Mr. Wimbrow about the sprinkler heads before he filed the 84 ATRs, and that initially, Wimbrow told him to file them collectively, as one ATR. This resulted in a discussion in which Belt stated that: (1) he told Wimbrow that this would not work; (2) they would never get the single, collective ATR completed since it would cause a problem with the maintenance people and their limited resources;[8] (3) they needed to have each sprinkler head checked off as it was repaired; (4) Wimbrow finally agreed with his position, and (5) he filed the 84 ATRs at one time as a result of Wimbrow's agreement. Mr. Wimbrow[9] merely

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[5]It was not clear from Mr. Belt's testimony whether the head of the Fire Services Group and the Operations Chief were the same, similar or successive positions.

[6]There were four "Process" buildings in the USEC Paducah plant. Two were about 1150 by 1050 lineal feet, two stories (90 feet high), covering 48,000 square feet (nine acres), with 68 sprinkler systems divided into four quadrants with 17 sprinklers in each sprinkler system. There were two other, smaller, 750 by 1,000 lineal feet, two stories (75 feet high) buildings with 36 sprinkler systems each. A "system" includes an alarm valve, a fire department connection, sprinkler piping and sprinkler heads, with 400,000 heads in the plant.

[7]An "ATR," (Assessment Tracking Report) was originally called a "Problem Report" (PR). I will use ATR for consistency.

[8]Mr. Belt's prediction on this aspect of his position proved to be fairly accurate, since he testified without contradiction that USEC finally had to contract out the repair of the sprinkler heads.

[9]Mr. Wimbrow testified that he was hired at the PGDP in 1996 as a Fire Protection Engineer, who then became Manager of the Fire Services Organization, replacing Jim Dodge in the latter position. He previously worked as a consultant on the Department of Energy (DOE) Engineering Staff, at the Midwest Technical Job Shop and as a contract

confirmed that they had discussed the filings, since he was one of several managers to whom ATRs could be submitted for screening before officially filing them, but did not deny that they had agreed to file the 84 ATRs separately.

Plant Manager, Howard Pulley, discussed the filings with Mr. Hicks and Mr. Wimbrow. Pulley said that there were 90 filings in total for the month and that it made Paducah look bad in comparison with the Portsmouth, Ohio USEC plant, which only had 5 or 6 filings. He stated that problems with the corrosion to 16 systems had to have been discovered over a period of time; that USEC had not taken actions that were required by their regulatory commitments to the NRC to address the systems that were out of service, and that they were basically in non-compliance with their certification basis. [10]

As a result of this, Mr. Wimbrow talked to Mr. Belt about the delay. When told what Mr. Pulley had said, Mr. Belt asked him whether he told Pulley of their discussion about filing either one or 84 ATRs, and Wimbrow responded; "you can't tell the plant manager . . . that." (T 78) Belt testified that he told Wimbrow: "That's the way we agreed, with you concurring. Me making them, and you concurring. And I said, it kind of makes us look bad, you know, like I done it on my own." (*Ibid.*) Shortly after that, Pulley came out with a memo saying that they should report ATR's in a "timely manner" some "within hours."

In response to a question about whether Mr. Wimbrow had left him "out to dry" on the matter, Wimbrow confirmed that they had a number of conversations about it, and had reached a consensus about how to document it, with the reports sent in, consistent with that format. However, Wimbrow stated that the content and format were not the issue, but that the timeliness was. Referring to the original conversation with Belt before the filings, Wimbrow contended that he had never told Belt that it was all right to delay in the filings. However, Mr. Belt testified that prior to that multiple filing of the 84 ATRs, they had not been "under the gun" to get the ATRs done until after they had completed a building or area. Belt confirmed that Wimbrow never criticized him for filing the 84 ATRs. The criticism came as related to the NRC investigation because he held some of the ATRs for two to three weeks, claiming that this had always been within prior policy, and that it resulted in the memo set forth above. In the end, Belt did not have a problem with the new policy to file the ATRs timely.

There was also a question of whether NRC had to be notified that the sprinkler conditions

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employee for Lockheed Martin at Oak Ridge, Tennessee. Just immediately before coming to the PGDP, he worked as Fire Protection Engineer. He has an Aerospace Engineering degree.

[10]The NRC found that there was a lack of an integrated corrective action plan to avoid recurrence of the problem in the sprinkler system. Mr. Wimbrow was assigned full time to that corrective action position in 1999 as a result of the NRC findings. He was aware that the NRC also found a "chilled environment" felt by PGDP employees to either use the problem resolution method or the employee concern program, which Wimbrow testified, dated back to the NRC takeover of the oversight of the PGDP. Ultimately, some 1,200 heads were found to have such corrosive head problems, with some being found through the date of the hearing. 800 heads have been replaced.

were filed late, since there were some "LCO" conditions ("Limited Condition [to] Operate") - meaning an "off" condition for sprinklers in that building - and that fire watches had to be established for them. As a result, the memo referred to above by Mr. Belt was circulated on August 12, 1999, stating that they had to file such ATRs within an hour of discovery. (RX 28) It referenced the large number of ATRs filed between May 10th and 25th of that year, and listed the ATRs filed by Belt. The memo also stated:

> I am aware that a former employee [not Mr. Belt] provided contrary guidance when he directed individuals in our department to not initiate an ATR on deficiencies until they were reviewed by fire protection engineer and determine(d) that corrective actions were required. (RX 28)

I find that Mr. Wimbrow evaded the direct question to him about hanging Mr. Belt "out to dry" on filing multiple ATRs rather than one in Wimbrow's discussion with Mr. Pulley. He did. Mr. Wimbrow said nothing to Mr. Pulley in Mr. Belt's defense about their discussion and agreement to file one ATR, and the reasons for it. Instead, Wimbrow allowed Belt to take the blame for those that might have been considered untimely by Pulley, even though Wimbrow and Mr. Belt had been actively discussing a huge, unprecedented problem at USEC.

In addition, I find that there had previously been no guidelines published on the timeliness of such ATR filings in that kind of a circumstance. I credit Mr. Belt's testimony that what he had attempted to do was to gather them all into one filing. He talked with Wimbrow about it, and Wimbrow had approved it. There was no discussion or suggestion by Wimbrow on separating them into time periods, so Wimbrow had also condoned the method of filing. By the present decision and order, I do not condone this particular behavior on the part of Mr. Wimbrow, and reject it as a proper action of a supervisor or manager in relation to his employees.

Mr.Belt testified that no one filed any adverse reports and no disciplinary action taken was against him. In fact, John Smith was supportive of him. In his September 1999 performance review, Mr. Wimbrow gave Mr. Belt a "commendable" performance rating, which was higher than he was given the year before, and the highest that he ever received. He had never had an "outstanding" rating. However, Mr. Belt testified that he did a better job than what he received for his ratings. I am unable to confirm this last point by objective evidence.

It is clear, and I find that: (1) Mr. Belt did not try to set Mr. Wimbrow up by filing the 84 ATRs at one time; and (2) no ill effects should have befallen Mr. Belt from the filing of the 84 ATRs at one time. It is not clear, however, beyond the immediate reaction and corrective actions taken by Mr. Pulley at that time to see to it that ATRs were more timely filed, that any such lasting effects on Mr. Belt did take place in violation of the Act. Had USEC terminated Mr. Belt for this action, or had management taken disciplinary action against him for doing so, there might have been a sufficient question raised that a violation of the Act resulted from his actions. However, for reasons which follow this discussion, Complainant has not established by a preponderance of the evidence that the business justification offered by the Respondent, namely its action of accepting Mr. Belt's voluntary IRIF a year later, was so motivated.

The Layoff - Mr. Belt's Voluntary IRIF:

On May 5, 2000, Human Resources (HR) Director, Bill Thompson, circulated a memorandum to all USEC salaried employees at the Paducah, Kentucky and Portsmouth, Ohio plants that there would be a Voluntary Reduction In Force (VRIF), with an "open period" to sign-up for it between May 5, 2000 and May 24, 2000. (CX 23) Mr. Belt had about 18 months to go for a full retirement, with 81 of the required 85 credits accumulated of the USEC retirement formula, consisting of the employee's age added to his or her years of service. Mr. Belt testified that until learning what he did after receipt of this letter, he intended to retire when he had his 85 credits. Until then, he had no intention of retiring or reason to do so.

USEC witnesses testified that it was policy to "bridge" employees up to two points for a full retirement. Mr. Belt confirmed that he knew of the policy, and that it had contributed to his decision not to pursue the VRIF when it was announced. He testified that he did know at the time of the RIFs that some VRIF employees were getting two points for their retirements, and that IRIFs were not. He also knew that it was company policy in RIFs to only bridge one or two such points if the employee had 83 points. Belt testified that several employees, Charlie Cromwell, Ed Ford, Bill Weber and Wanda Holiman, were "bridged" two points, and that Ed Yates and Joanne Kruger were also "bridged" points, to give them 85 points for full VRIF retirements. No one was given "bridge" points to take an IRIF. Belt testified that Cromwell is still working directly for USEC.

I find that there was no evidence that USEC misapplied the well established, retirement "bridge" point policy in accepting the voluntary IRIF of Mr. Belt.

Shortly after the "open period"ended, Mr. Belt learned from Pat Jenny, who had succeeded Mr. Wimbrow as his supervisor, that the Fire Protection Engineer position would be eliminated, and, through Chief John Smith, that the work would be absorbed by the fire service shift officers. Belt testified that Jenny told him that she did not know of another position in the plant that he could do, and that there was no other way that he could have known this information from that which was available at

that time. Jenny credibly testified that she talked to Mr. Belt of the elimination of the position title only, and that she did not tell him that there were no other jobs that he could perform.

I find that none of the management or benefits people that Mr. Belt talked to ever told him that he had been ranked the highest of those employees who were being evaluated for IRIF, or that he had ever been evaluated for the IRIF. I also find that none of them ever told him of his value to the company in a way that he could understand that he was being asked to stay. In so finding, I do not discredit the testimony of either Pat Jenny, Darlene Coffey, or Brenda Proffer.

When Mr. Belt heard that his job "position" had been eliminated, I find that this is all that he heard. I believe that Ms. Jenny did continue talking about the "position" as a "title"; that Mr. Belt's identification with that title was singular, and considered by him to be an honor, the elimination of which, he took very personally. Even in his final rebuttal testimony, on the second day of the hearing, both Belt and his attorney used the terms "job," "position," "work" and "title" interchangeably. Belt testified: "I told him [John Smith] in the conversation with Pat she said the position, the job was going away, and I asked her if there was any other job that I could do for these other 18 months. . . . [and] [s]he said no." (T 393-394)

In fairness to Mr. Belt, this followed questions by his attorney in which he used the term "position", asking whether Belt had told Smith that Jenny had said his "job position was going to be eliminated," and then, "Did you tell him anything else after she said that the job was going to be eliminated . . .," both of which were affirmed by Belt. Belt then testified that he asked her "whether there was any other work" that he could do, (T 393) invoking the fourth term, "work."

Adding to the confusion, a question was then asked by his attorney, after Mr. Belt talked of the conversation with Smith about Jenny saying that the "position, the job was going away," with a preface that proposed, "you were sitting here while she testified, and stated that she told you your job title was being eliminated." This was followed by a discussion about it, which he generally confirmed. However, he denied a specific point of the conversation in which she said that there was still work that he would be doing, and subcontractors to have coordination with, etc. (T 394) I credit the fact that this was said by Jenny, but believe that Belt did not hear or absorb it. It is consistent with her conversation with him, and with her testimony, which I have credited.

I have credited Ms. Jenny's testimony that she told Mr. Belt his job "title" was being eliminated or "going away." I have also concluded that she did not say the activities of his "job" or his "work" were going away, and that, in fact, it was the direct opposite. Since the terms "title," "position," "work" and "job," were used interchangeably at the hearing, it warrants an inference that Mr. Belt was also mixing the use of those terms when he discussed the matter with Ms. Jenny in their meeting. Therefore, I find that when Ms. Jenny spoke with Mr. Belt in her meeting with him, and when she testified at the present hearing, she was attempting to make these distinctions. I find that she did tell him that it was the "title" or "position" that was going away, but not the work.

I also infer from the confusion that he had about the "job" vs. "title" issue, that he had substantial confusion about what was going to happen to him as a result of those changes. In particular, he heard that the "title" or "position" of Fire Protection Engineer was "going away," and then concluded, and acted upon his conclusion, that both the "title" or "position" and the "work" or the "job" were all going away - whatever of those four terms were used - and then that he should submit an application for an IRIF.

I find that any lack of artfulness that may have occurred in Ms. Jenny's explanation of what was going to happen to Belt with the loss of Fire Protection Engineer title was just that: an inartful explanation of it. It was not part of a conspiracy to defraud to trick Mr. Belt into believing that they had no work for him to do, so that they could get him to voluntarily submit to an IRIF. Mr. Belt did, in fact, misapprehend the reorganization of the plant, the elimination of his job title, and how the Fire Protection Engineer work would continue to be performed at the PGDP. As a consequence he did, voluntarily and without coercion or fraud, based upon his own misapprehension of that information, submit his request for a voluntary IRIF, without waiting for the IRIF to be announced.

There is no evidence on the record to the effect that, if Mr. Belt had been told that he was being IRIF'd, he would have been unable to apply for an early retirement that would have included the exact same severance package that the IRIF'd employees had received. He has been attempting to assign the blame for his action to others. There is insufficient evidence to establish that this was the case. Therefore, management could not have been agreeing to his request for a voluntary IRIF for reasons protected by the ERA.

Pat Jenny told Mr. Belt to talk to Darlene Coffey, in HR. He did so, and she told him that it probably would not be to his advantage to accept a VRIF, even though she knew that his job was going away. Ms. Coffey then referred Mr. Belt to Brenda Proffer in HR benefits to determine his options. Brenda recommended that he take an Involuntary Reduction in Force (IRIF). She ran the numbers, and gave him a printout to return to Ms. Coffey. There is no evidence that these actions were part of any conspiracy to get Belt to submit an application for an IRIF in violation of the Act. Therefore, they do not change the above result.

Mr. Belt testified that no one said anything to him about the good job that he was doing, nor did they ask him to stay, or that they would look for another job that he could do in the plant, and I so find. In fact, no one even to talked to him about it.

It was Mr. Belt's own conclusion that the only thing that he felt that he could do, after talking with his wife, was to take the IRIF. He went to Mr. Smith and asked him if he could voluntarily take

an IRIF. Smith agreed to sign papers to do so, and then, on June 22, 2000,[11] he signed the IRIF papers prepared by USEC. The primary document stated: "This memo confirms that you have asked us to select you in the upcoming USEC involuntary reduction in force." It also stated: "I acknowledge that I have voluntarily requested to be signed-up for the RIF and I understand this and you've asked us to select you in the upcoming USEC involuntary reduction in force. (RX 3) He testified that they never said that they had to do something special for him since he was outside of the May 5th to 24th window.

Subsequent documents obtained by Mr. Belt showed the elimination of the position of Fire Engineer on June 8, 2000 (CX 24) and another memo by John Smith that the job was vacant, dated June 7, 2000. (CX 25)

Bill Thompson signed Mr. Belt's IRIF notification on June 29, 2000. It stated: "This letter is to notify you of an involuntary reduction in force of USEC salaried employees due to this IRIF, your employment with USEC will be terminated on July the 14th, 2000," (CX 28) which was actually his last day of employment. This was a form letter that was sent to all IRIF'd employees.

In response to a question from the undersigned concerning the date that should be considered as the starting date for the 180 day statutory requirement for filing a complaint under the Act, which he filed on December 29, 2000, Mr Belt testified that on July 13, 2000, one of the employees, Mike Cash, who had been scheduled for IRIF was called back and asked to return to work - to "stay on the payroll," according to Mr. Belt. Cash did so, and was working on July 14, 2000. Belt's position is that this establishes that until the actual date of the IRIF comes and goes, he could be called back, so that the limitation date does not start to run until that date. He also asked that I consider the effective date of the pension benefit, which could not begin until the day after July 24, 2000, his last day of employment.

Mr. Belt's 1997 ATR Against Mr. Wimbrow:

Mr. Belt claims that the following events of 1997 and their ramifications should be considered as background evidence connected to his current alleged violations of the ERA, in causing him to take a voluntary IRIF in retaliation for filing ATRs. For reasons stated, I find that they should not be so considered.

On September 11, 1997, Mr. Belt prepared a nuclear industry concern report over allowing "hotwork" (welding) to be completed in an area where the sprinkler was deactivated, in conflict with an OSHA regulation. (RX 1) He gave the report to Mr. Wimbrow and asked him to file an ATR on it. After they discussed it, Wimbrow put the report aside, where, he credibly

[11]There is no comparative evidence in the record to demonstrate that other IRIF emplyees were told such things or asked to stay. I am unable to draw any advance inference from this alleged failure on the part of the Respondent. (The fact that Mike Cash's IRIF was reversed on July 13, 2000 does not change this.)

testified, it got covered with other papers and he did not do so. Belt then filed an ATR against Wimbrow for not filing the original ATR. (RX 2) When Belt came in and asked about it, Wimbrow found it and processed it that day.

By the time ATR was turned over to the Shift Supervisor, on September 17, 1997 Belt had filed the second ATR on Wimbrow's failure to file the original. (RX 2) Belt testified that he first took the second ATR to the Shift Super Coordinator, (Super); that he showed it to him, and that the Super told him, "You know, you're going to get in big trouble with this, filing an ATR on your supervision." Belt responded, "That's the way it is," and filed it anyway. The Super called the Employee Concerns office, and talked to Steve Seltzer there, stating that Belt was coming to see him.

Mr.Belt credibly testified that Mr. Wimbrow became agitated about filing the ATR against him, and turned very cool toward Belt. As a result, on September 26, 1997, Belt filed an Employee Concern about this reaction. (CX 8) He was interviewed by Mr. Seltzer, whose report stated that Belt was concerned that he would be acted against for two reasons: (1) he had filed a problem report (ATR) against Mr. Wimbrow for failing to file a report; and (2) since filing the ATR he had never been contacted about it by either Wimbrow, or Wimbrow's Supervisor, Charlie Hicks, Division Manager of Fire and Maintenance.[12] Belt wanted to know, "where I stand and what's going to happen to me;" whether Hicks was prejudiced against Belt because he was white, and whether Hicks perceived Belt as a satanic follower or a "devil."

Mr. Seltzer then told Mr. Hicks that no one had spoken with Mr. Belt about the ATRs and that it could look like Belt was being "shunned or shut out." As a result, Seltzer stated that Wimbrow later spoke with Belt, assuring him that the filing was the appropriate action. However, there was no "sit down" meeting to "clear the air" on it. Later, Hicks assured Seltzer that, insofar as his ability as a black to work with whites, he had worked out problems on other matters with the head of the KKK. With regard to Belt's perception of Hicks as a satanic follower or a "devil," Hicks had recounted telling Belt that he could "work with the devil if necessary" to get things done in a professional manner. He assured Seltzer that what he meant was that he could work professionally with Belt**.**

I find that Mr. Belt has failed to establish a link between the facts surrounding the actions of Mr. Belt's supervisors in response to his filing the 1997 ATRs and the related Employee Concern about Mr. Wimbrow's reaction to it, and the evidence submitted in support of the current alleged ERA violations. That evidence is insufficient to establish either an independent violation of the Act, albeit time barred, or

[12]He was later replaced by Pat Jenny.

to be considered as background information to support the present complaint.[13] In other words, I find that the 1997 matter was resolved in an appropriate manner.

The NRC Investigation:

Complainant offered evidence that there had been an NRC investigation with conclusions that there was a "chilled environment" found at the PDGP plant which interfered with employees filing concerns and ATRs. (CX 33) I have admitted these documents into evidence over the objection of the Respondent, and find that they are material and entitled to some weight in considering Mr. Belt's arguments, since the events concerning his filing of the 84 ATRs involve, in part, the same allegations and time period as that considered by the NRC, and that the NRC determination concerning a "chilled environment" existing at that time at the site, is also relevant to the case at bar.

However, I also find that Mr. Belt's allegations of ERA violations must be considered de novo, in the present proceeding and determined on the evidence of record, notwithstanding the NRC opinion. Mr. Belt's allegations must be supported by a preponderance of the evidence in this case, and the determination by another agency that there were violations of its governing statute is not determinative of the present action under the ERA.

I find that Mr. Belt's NRC filing constitutes substantial evidence in support of certain elements of Mr. Belt's prima facie case, since the NRC action is "protected activity," in and of itself, and that the "chilled environment" determination by the NRC found to exist at PGDP. The result of the letter may also be given weight in considering the motivation of USEC in accepting Mr. Belt's voluntary request for an IRIF.

However, the question of whether Mr. Belt's choice of seeking a voluntary IRIF was freely taken, or otherwise induced or coerced by actions of management sufficient to constitute an unlawful constructive discharge under the Act, as argued by the Complainant, is still open to question as a matter of fact and law in the present forum.

In addition, the NRC letter, beside being protected, may be considered relevant in substantiating Complainant's motive for filing the charge or initial complaint with OSHA, but it is not material to the final question of law that must be determined here, under the ERA, on whether the evidence presented in the present case is sufficient to establish the nexus between the protected activity and the adverse action of accepting Mr. Belt's voluntary IRIF by a

[13] It is my initial finding that, although this circumstance fostered a continuing personality conflict between Mr. Belt and Mr. Wimbrow that may have interfered with them becoming friends or buddies, such a condition is not a required term or condition of employment. I find that Mr. Wimbrow did a fairly commendable job in working with Mr. Belt. He appeared to be rating him at fair and high levels based upon his work performance alone, rather than their personal relationship. I find, therefore, that the 1997 incident over the personal ATR, whether it was an attempt to "set-up"of Wimbrow or not - and there is insufficient evidence to establish that this was the case - was too remote in time to consider as part of an alleged motivation for luring Mr. Belt into his "voluntary" IRIF in July of 2000.

preponderance of the evidence. That is my determination to make, *de novo,* from all the evidence in the record of the actions taken by Respondent relative to approval of the IRIF request. There may well have been a "chilled environment" at the PGDP related to management's reaction to Complainant's 84 ATRs, but more evidence is required to establish the connection to his "voluntary" IRIF.

Not only is it not clear that he would have been IRIF'd if he had not voluntarily done so; he conceded as much in his post-hearing brief, and he verified the voluntary nature of his consent in the June 22, 2000 documents that he signed.

CONCLUSIONS OF LAW

The Statutory Requirements of the Energy Reorganization Act:

As discussed above, the present case has been brought under the employee protection provisions of the Energy Reorganization Act, at 42 U.S.C Section 5851, its "whistleblower" provisions designed to protect employees from retaliation for protected activities such as complaining, testifying, or commencing proceedings against an employer. These provisions have been construed broadly to afford protection for participation in activities in furtherance of the statutory objectives. *See*, *Devereux v. Wyoming Association of Rural Water*, 93-ERA-18 (Sec'y, October 1, 1993), and *Tyndall v. U.S. Environmental Protection Agency*, 93-CAA-6, 95-CAA-5 (ARB, June 14, 1998), (final order approving settlement and dismissing complaint), 96-ARB-195 (ARB Sept. 25, 1996). For reasons more particularly set forth herein, I find Mr. Belt had either raised particular issues or begun proceedings, or was about to begin, proceedings under the Act, and will proceed accordingly.

The purposes and employee protections of The Energy Reorganization Act ["ERA"], 42 U.S.C. § 5851, provide "whistleblower" protection against harassment and retaliation by an "employer" for employees involved in the nuclear industry, who: (1) notify their employer of an alleged violation, (2) oppose a practice that would be a violation of the Atomic Energy Act of 1954, (AEC) or (3) testify before Congress or any Federal or State agency regarding a violation of the AEC. It states that "[n]o employer" may discharge or otherwise discriminate against any employee with respect to compensation, terms, conditions or privileges of employment because the employee engaged in the above activities, or has assisted or participated or is about to assist or participate in any manner in such proceedings as those listed, "or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954." A complaint alleging such violations must be filed under 42 U.S.C § 5851(b)(1) with the Secretary of Labor within 180 days after a violation of the Act occurs.

Under the ERA, once the complainant presents a prima facie case, rather than merely "articulating" or stating a legitimate business reasons for the action, the employer must establish by clear and convincing evidence that it took the unfavorable action for a legitimate,

nondiscriminatory business reason, and that it was the same as it would have taken, in the absence of the employee's protected activity. On finding a violation, the employer may be directed to "abate" certain effects of the employer's unfavorable personnel action. This means that the discriminatee may be ordered reinstated with back pay except for compensatory damages, pending court review of the final decision of the Secretary of Labor.

The Regulations:

The implementing regulations governing employee complaints under 29 C.F.R. Part 24, cover all of the "whistleblower" provisions of the various environmental acts. They provide at 29 C.F.R. §24.1 that "No Employer" may discharge or otherwise discriminate against any employee who has:

> (1) Commenced, or caused to be commenced, or is about to commence or cause to be commenced, a proceeding under one of the Federal statues listed in Section 24.1 or a proceeding for the administration or enforcement of any requirement imposed under such Federal statute;
>
> (2) Testified or is about to testify in any such proceeding; or
>
> (3) Assisted or participated, or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of such Federal statute, ...
>
> * * *
>
> - or, under the ERA, has notified the employer of, or, on notice to the employer has refused to engage in, any action prohibited by the Atomic Energy Act of 1954, or has testified concerning any of the provisions of the Acts in any federal or state proceeding, as stated in the above 1992 amendments.

29 C.F.R. §§ 24.2(a)-(c). (Emphasis added)

In addition, as also stated above, 29 C.F.R. § 24.7(b) states that a determination of a violation of the ERA may only be made under the statutory provisions that the "protected behavior or conduct was a contributing factor in the unfavorable personnel action . . .," and that the respondent has not demonstrated "by clear and convincing evidence that it would have taken the same personnel action
. . ." as it would have taken without such protected behavior. The rule provides that, upon finding a violation of the ERA, the determination "shall" contain a recommended order "that the respondent take appropriate affirmative action to abate the violation, including reinstatement to his or her former position, if desired, together with the compensation (back pay) . . . [etc.] . . . and, when appropriate, compensatory damages," with the compensatory damages not effective until final decision by the Administrative Review Board. 29 C.F.R. §§ 24.7(c)(1)&(2).

The Timely Filing of the Complaint(s):

The timeliness issue here is whether or not Mr. Belt's initial OSHA complaint was timely filed within the 180 days prescribed by 42 U.S.C. § 5851(b)(1), and then whether the the second complaint concerning the failure to rehire him as a Janitor, should be separately considered as having been timely filed for purposes of this entire matter under those provisions.

In *Amini v. Oberlin College*, 259 F.3d 493 (6th Cir. 2001), the Sixth Circuit specifically held in an EEOC case, that such a period begins to run when the employment action at issue is communicated to the employee, i.e., when the employer makes and communicates a final decision to the employee. In the present matter, the initial complaint was filed on December 29, 2000. USEC maintains that the documents of June 22, 2000 set forth the date that starts the statute's 180 day filing period. I note that, USEC's letter of June 29, 2000 (CX 28), might also appear to be the date of the alleged violation that informed Mr. Belt of the effective date of his involuntary reduction in force, and therefore of the alleged violation, even if the documents of June 22, 2000 do not make that clear.

However, the United States Supreme Court has developed another standard to be used in "hostile environment" cases in *National Railroad Passenger Corp. v. Morgan*, slip op. 00-1614, 232 F.3d 1008, aff'd in part, rev'd in part, and remanded June 10, 2002, that post-dates the Sixth Circuit's *Oberlin College* decision. According to the Court, hostile environment cases are different from those involving discrete acts. In hostile environment claims, the "unlawful employment practice" that starts the 180 or 300 day period cannot be said to occur on any particular day. The Court explained that so long as an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered for purposes of determining liability. Such a claim will not be time barred if all acts constituting the claim are part of the same unlawful practice and at least one act falls within the filing period.

I find that, to the extent to which Mr. Belt has attempted to establish that he was terminated as part of the "chilled environment" found to have existed in the NRC findings, together with his attempts to link various reactions of management officials to his alleged protected activities, they demonstrate that his is a hostile work environment case, within the meaning of *Morgan, supra;* and that the day Mr. Belt was actually terminated (July 14, 2000) constitutes the starting point for the 180 day filing period of the complaint. Therefore, Mr. Belt's initial complaint was timely filed, and his second complaint regarding the failure to rehire him was facially timely filed, without question.

Regulatory Standards for Establishing Violations of the ERA:

Related to the establishment of jurisdiction under the ERA, a complainant in a "whistleblower" case must first establish that the respondent is an "employer" under the provisions alleged to have been violated under the Act, and satisfy the initial burden of establishing a prima facie case of discrimination by showing the following:

(1) The "employer" is subject to the Act; 29 C.F.R. §24.2(a); ERA: 29 C.F.R. §24.5(b)(2)(ii)

(2) The complainant engaged in protected activity; 29 C.F.R. §24.2(b)(1)-(3): ERA: 29 C.F.R. §24.2(c)(1)-(3) and 29 C.F.R. §24.5(b)(2)(iii)

(3) The complainant was subjected to an adverse employment action; 29 C.F.R. §24.2 (a)&(b)

(4) The employer "knew" of the protected activity when it took the adverse action, ERA: 29 C.F.R. §24.5(b)(2)(ii), and

(5) An inference is raised that the protected activity was the likely reason for the adverse employment action. (*i.e.* ERA: the protected activity was a contributing factor in the unfavorable personnel action.) 29 C.F.R. §24.5(b)(2)(iv)

See, Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); *Simon v. Simmons Foods, Inc.*, 49 F.3d 386, 389 (8th Cir. 1995); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F. 2d 1159 (9th Cir. 1984); *Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-46 , slip op. at 11 n.9 (Sec'y Feb. 15, 1995), *aff'd sub nom., Carroll v. United States Dept. of Labor,* 78 F.3d 352, 356 (8th Cir. 1996).

Case Law:

In general, under established case law, once having established the employer/employee status, the employee must establish his prima facie case, and under the ERA, that it was a contributing factor to the unfavorable personnel action. The respondent may rebut the complainant's prima facie showing by producing evidence that the adverse action was motivated by legitimate, nondiscriminatory reasons. Under the ERA, the respondent must produce clear and convincing evidence that it had a legitimate, nondiscriminatory reason for its action, while it may merely articulate the legitimate, nondiscriminatory reason under the other environmental statutes. Complainant, then must counter respondent's evidence by proving that the legitimate reason proffered by the respondent is false or a pretext for the prohibited discriminatory reason. *See, Yule v. Burns International Security Service*, Case No. 93-ERA-12, slip op. at 7, 8 (Sec'y May 24, 1994). This burden now includes the entire analysis of the burdens of production, proof and shifting obligations in a Title VII, Civil Rights action under 42 U.S.C. § 2000e cases to the relevant environmental "whistleblower" cases, as established under *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) and *Burdine, supra*, through *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

From the outset, under *Yule*, the complainant maintains the burden of proof and must establish by a preponderance of the evidence that he was retaliated against in violation of the law. *See, St. Mary's Honor Center, supra; Darty v. Zack Company of Chicago*, Case No. 82-ERA-2,

slip op. at 5-9 (Sec'y Apr. 25, 1983) (citing *Burdine, supra*). Additionally, with specific relationship to the ERA, the Secretary stated in *Thompson v. TVA*, 89 ERA 14, (Sec'y July 19, 1993), that, under *Hicks* and *Burdine*, after the employer establishes its legitimate non-discriminatory rebuttal, the first determination that must be made is whether the evidence shows that the discriminatory reason is more likely the motivation for the adverse reason. The rules clarify this obligation by adding in parenthesis, as set forth above, that the complainant must prove that the protected activity was a "contributing factor in the unfavorable personnel action." Simply stated, the complainant continues to bear the burden of proving allegations of discrimination by a preponderance of the evidence.

This view is no different than what has recently been clearly restated by the United States Supreme Court in its review of *Hicks* in, *Reeves v. Sanderson Plumbing Products, Inc.* 530 U.S. 133, (2000), wherein the Court assumed (without deciding) application of the *McDonnell-Douglas/ Hicks* standards to court analysis of alleged violations under the Age Discrimination in Employment Act (ADEA). Indeed, the Court in *Hicks*, adopted its prior 1981 standard as set forth in *Burdine, supra*, that "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff," as now reinforced in *Reeves, supra.*

In the present case, weighing the impact of settled case law and the rules set forth at 29 C.F.R. Part 24, which codifies the above case law, Complainant has established that he was engaged in protected activity; that an adverse action has taken place against him (his layoff or IRIF) and that an inference has been established that his protected activity was a contributing factor to his layoff. USEC has articulated what is facially a "legitimate non-discriminatory" business reason for the unfavorable personnel, or adverse, action (layoff), in that the IRIF was voluntarily requested by Complainant, and that it would have taken the same personnel action against Mr. Belt as it would have taken without his protected behavior. It is my opinion that USEC has established this position by clear and convincing evidence.

While the "legitimacy" and "non-discriminatory" basis for the action is called into question by Mr. Belt's challenge, as either lacking credence or constituting a pretext for the action under the ERA burden shifting/ production standards, the result is the same: once the hearing has taken place, and the prima facie case presented with the business reason for the action established by the employer, the burden shifting analysis drops away, and Mr. Belt continues to have the burden of establishing whether the evidence shows that the discriminatory reason is more likely the motivation (the contributing factor) for the adverse action. In other words, he still must establish that this protected conduct remained a contributing factor in his unfavorable personnel or adverse action, and that he was discriminated against in violation of the applicable statutes by a preponderance of the evidence.

For the reasons set forth herein, I find that Mr. Belt has not met his burden of establishing a substantial, reasonable basis for his belief that his raising of safety considerations in filing of ATRs over the corroded sprinkler heads at USEC was the motivating factor in USEC's

acceptance of his voluntary application for an IRIF subject to the "whistleblower" protections of the ERA. He has, therefore, not established a violation of the ERA by a preponderance of the evidence. As part of this, I find that the employer has established by clear and convincing evidence that the layoff of Mr. Belt was for a legitimate business reason, namely, his own request to do so, after the period for requests for VRIFs had expired, and that it would have taken the same unfavorable personnel action in the absence of his protected action regarding the sprinkler ATRs.

Since this case has been presented to the undersigned after a full hearing on the matter, the Complainant's ultimate burden of proof has remained that he establish his allegations of violations of the Act by a preponderance of the evidence, as the paramount standard.[14] The following step-by-step analysis is presented for the sole purpose of order in understanding the various principles involved in evaluating the evidence in this case.

1. USEC's "Employer" Status:

Under 29 C.F.R. § 24.2: (a) the complaining employee must establish that the alleged discriminating employer is an "employer" subject to the Act. For the provisions of the ERA to be applicable, it must be determined: (1) Whether USEC is an employer, and (2) Whether there is a sufficient nexus of the complainant's protected activity and respondent's adverse action to constitute a violation of the ERA. *McNeal v. Foley Co.*, 98-ERA-5 (ALJ Jul. 7, 1998).

Since USEC has stipulated to its status as an employer under the ERA and the evidence supports that stipulation, no further inquiry into that status is required. USEC is, therefore an "employer" under the provisions of 42 U.S.C. § 5851, subject to the jurisdiction of this court, and since the parties have also stipulated that Complainant is now, and at all times material herein, a "person"as defined in §211 of 42 U.SC., and an "employee" as defined in § 211 of 42 U.S.C., there is a sufficient nexus of his conduct to the purposes of the ERA to extend coverage to Mr. Belt's activities thereunder.

2. Complainant's Protected Activity:

a. General Rules:

The environmental statutes all protect an individual's participation in activity which furthers the respective statutory objectives. *See, Devereux, supra, and Jenkins v. U.S. Environmental Protection Agency*, 92-CAA-6 (Sec'y, May 18, 1994). In other words, the Acts protect the reporting of environmental or safety violations. *See, Johnson v. Old Dominion Security*, 86-CAA-3,4-5 (Sec'y May 29, 1991). Protected activity is broadly construed under the

[14]See, ALJ's comment in *Niedxielski v. Baltimore Electric, Co.*, 2000-ERA-4 (July 13, 2000), to the effect that, "working through the prima facie case is useful since the ultimate burden of proof still involves many of the elements covered in the prima facie analysis. . . ."

environmental whistleblower protection acts. *See*, *Guttman v. Passaic Valley Sewerage Commission*, 85-WPC-2

(Sec'y March 13, 1992). Concerns that "touch on" the environment can be considered as "protected activity." *See, Dodd v. Polysar Latex*, 88-SWD-4 (Sec'y 22, 1994).

Internal complaints are also considered, pursuant to the environmental acts, as "protected activity." In *Hermanson v. Morrison Knudsen Corp.*, 94-CER-2 (ARB June 28, 1996) the Board held that "[i]nternal safety complaints are covered under the environmental whistleblower statues in the Eighth Circuit, the Fifth Circuit and every other circuit." *See,* Amendments to the ERA in the Comprehensive National Energy Policy Act of 1992 (CNEPA), Pub. L. NO. 102-486, 106 Stat. 2776," and *Dodd, supra* (CERCLA & SWDA); *Reynolds v. Northeast Nuclear Energy Co.,* 94-ERA-47 (ARB Mar. 31, 1997) (ERA); *Passaic Valley Sewerage Commissioner's v. United States Department of Labor,* 992 F.2d 474 (3d Cir. 1993) (CWA); *Wagoner v. Technical Products, Inc.*, 87-TSC-4 (Sec'y Nov. 20, 1990) (TSCA); *Guttman v. Passaic Valley Sewerage Commissioners,* 85-WPC-2 (Sec'y Mar. 13, 1992). The Board further noted in *Hermanson* that the only exception to this rule at that time prior to the 1988 amendments, had been "for cases filed in the Fifth Circuit under the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. Section 5851 (1988), prior to October 24, 1992." *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (5th Cir. 1984).

In addition, an informal complaint, such as verbal communication, constitutes "protected activity." *See, Nichols v. Bechtel Construction, Inc.*, 87-ERA-44 (Sec'y Oct. 26, 1992) (employee's verbal questioning of foreman about safety procedures constituted protected activity), *aff'd* in *Bechtel Construction, Inc. v. Secretary of Labor, 50 F. 3d 926, 931* (11th Cir. 1995) stating that "general inquiries regarding safety do not constitute protected activity," but a pattern of inquiries regarding how to handle contaminated material can add up to protected activities". *See,* also, *Dysert v. Westinghouse Electric Corp.*, 86-ERA-39 (Sec'y Oct. 30, 1991) (employee's complaints to team leader protected); *Crosier v. Portland General Electric Co.,* 91-ERA-2 (Sec'y Jan. 5, 1994) (complainant's questioning his supervisor about an issue related to safety constituted protected activity). The environmental "regulations make it clear that a formal proceeding is not required in order to invoke protection of the Act." *Kansas Gas & Electric Company, v. Brock* , 780 F.2d 1505, 1512 (10th Cir. 1985), *cert. denied,* 478 U.S. 1011 (1986).

To constitute protected activity, however, the substance of the complaint must be "grounded in conditions reasonably perceived to be violations of the environmental acts." *Minard v. Nerco Delamar* Co., 92-SWD-1 at 5 (Sec'y Jan. 25, 1994). It is insufficient to show that the environment may be negatively impacted by the employer's conduct. *Decresci v. Lukens Steel Co.*, 87-ERA-13 (Sec'y Dec. 16, 1993) (the environmental whistleblower provisions are intended to apply to environmental and not other types of concerns.)

b. Specific Protected Activies:

Recognizing that the parties have stipulated that subsequent to September 17, 1997 the Complainant engaged in protected activity, Mr. Belt's specific protected activities in the present matter consisted of, but were not limited to, the following actions: the filing of 84 ATRs,

employee concerns and NCR complaints involving the various sprinkler system violations, as otherwise more specifically set forth herein.

3. Adverse Action:

An "adverse action is simply something unpleasant, detrimental, even unfortunate, but not necessarily (and not usually) discriminatory." *Stone & Webster Engineering Corp. v. Herman,* 1997 115 F.3d 1573 (11th Cir. 1997). "Adverse action" encompasses any discrimination with respect to an employee's compensation, terms, conditions or privileges of employment. *DeFord v. Secretary of Labor,* 700 F.2d 281 (6th Cir. 1983).

I find that, the present voluntary IRIF is alleged to be a specific adverse action, which, if proven in Mr. Belt's case, would warrant a specific remedy or remedies, involving restoration of his employee and retirement status. It also would result in not only loss of income or benefits, but loss of reputation and prestige, as well as a lower paying job.

4. Knowledge of Protected Activity:

Respondent's knowledge of a protected activity at the time of its adverse action is an essential element of the complainant's prima facie case. *See, Morris v. The American Inspection Co.*, 92-ERA-5, slip op. at 6, 7 (Sec'y Dec. 15, 1992). Recognizing that the parties have stipulated that Respondent was aware of Complainant's protected activity, Complainant has easily sustained this burden. It was the ATRs, concerning the safety and health of employees being serviced by someone without adequate training, and not in conformance with OSHA regulations, that led to the delays in designing and implementing the training modules, his low ratings by management for them and his resultant IRIF, as otherwise more specifically set forth herein.

5. Motivation and Timing:

A complainant must produce sufficient evidence to raise an inference that the motivation for the adverse action was his protected activity. Temporal proximity between the whistleblowing activities and the adverse actions is sufficient to establish a prima facie case. *Tyndall, supra,* citing *County v. Dole,* 886 F.2d 147 (8th Cir. 1989); *Bartlik v. United States Department of Labor,* 73 F.3d 100 (6th Cir. 1996). However, in *Hadley v. Quality Equipment Co.*, 91-TSC-5 (Sec'y Oct. 6, 1992), the Secretary indicated that although a sequence of events occurring in a short period of time may invoke an inference of causation, it is still necessary to examine the events as a whole in determining whether the ultimate question of whether a complainant has proved by a preponderance of the evidence that the retaliation was a motivating factor in the adverse action. In other words, an administrative law judge may decline to find retaliation, notwithstanding the short proximity of events, if other facts show that complainant would have been fired had he not engaged in the protected activity. *Hadley, supra,* (employee engaged in a stream of obscene behavior immediately prior to adverse actions by employer);

Jackson v. Ketchikan Pulp Co., 93-WPC-7 (Sec'y Mar. 4, 1996) (complainant was fired for being out of his work area rather than his protected activity even though there was temporal proximity between the protected activity and discharge).

In the present case, motivation may be inferred from the timely sequence of events related to the raising of OSHA and NRC regulatory health and safety issues involving the corroded sprinkler heads.

6. The "Legitimate and Non-Discriminatory" Business Reasons:

The respondent has the burden of producing evidence to rebut the presumption of disparate treatment, established by complainant's prima facie case, by presenting evidence that the alleged disparate treatment was motivated by legitimate, non-discriminatory reasons for the adverse action. *See, Burdine, supra,* (Title VII case). This must be established by clear and convincing evidence under the ERA. The complainant, however, retains the ultimate burden of proof. He must establish by a preponderance of the evidence that respondent's adverse actions constituted discrimination for his protected activity. Here, I have concluded that it was not Mr. Belt's protected activity that was the motivating factor in Respondent's decision to grant his application for an IRIF. *Dysert, supra,* and *Burdine, supra*.

Coerced "Voluntary" IRIF - Constructive Discharge:

Mr. Belt alleges that he was coerced into volunteering for the IRIF, that is, that he was constructively discharged. This, if proven, would constitute a "constructive discharge."

Traditional Tests For Constructive Discharge:

Complainant argues that his voluntary IRIF was not voluntary, and that it, therefore, was a constructive discharge for his protected activity, and a violation of the ERA. He raises an issue outside of the usual "constructive discharge"/coercion theory which is normally utilized to argue such an unlawful termination.

The lead case for constructive discharge in the Sixth Circuit is *Held v. Gulf Oil Co.*, 648 F.2d 427 (6th Cir. 1982), where the plaintiff brought a Title VII action against her employer alleging sex discrimination and constructive discharge. The Sixth Circuit relied on Fifth Circuit reasoning to hold that for constructive discharge to exist it must be shown that, "working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." (*Id.* at 432) To determine whether the working conditions meet this threshold, the Court reasoned that a constructive discharge analysis "depends upon the facts of each case and requires an inquiry into the intent of the employer and the reasonably foreseeable impact of the employer's conduct upon the employee." (*Ibid*, citing *Jacobs v. Martin Sweets Co., Inc.*, 550 F.2d 364 (6th Cir. 1977). Therefore, a finding of constructive discharge in the Sixth Circuit requires an inquiry into both the intent of the employer

and the objective feelings of an employee.

To determine the intent of the employer, the Sixth Circuit has required deliberate action to give rise to constructive discharge. In *Moore v. KUKA Welding Systems*, 171 F.3d 1073 (6th Cir. 1999), another Title VII claim, the Court said that "the employer must deliberately create intolerable working conditions, as perceived by a reasonable person, with the intention of forcing the employee to quit and the employee must actually quit." *(Id.* at 1080) To determine the feelings of the employee, the Court has applied a reasonable person standard. To examine whether conditions are unbearable, the Sixth Circuit "applies an objective standard, under which the conditions must be so undesirable that a reasonable person in the same situation would choose to resign." *Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510 (6th Cir. 1991).

The Court has also suggested that constructive discharge can be present when an employee is given a "choice" between continued employment with impending termination and early retirement. In *Scott v. Goodyear Tire*, 160 F.3d 1121 (6th Cir. 1998), the Court examined an age discrimination case. There the employer was downsizing its management personnel, and gave the plaintiff three choices: he could be laid off with no benefits or possibility of recall; laid off with supplemental unemployment compensation benefits and remain under consideration for recall to a new position; or opt for retirement. Scott chose retirement. The Court said that constructive discharge was applicable. It recognized that such a case was not typical of constructive discharge cases, where employees claim to be subjected to intolerable working conditions. Instead, the plaintiff alleged that he was essentially given a choice between voluntary and involuntary retirement.

> Scott thus chose retirement having no definite prospect of continued employment with the company. Therefore, where ordinary charges of constructive discharge typically entail a decision on the part of the employee to resign in light of an intolerable environment or some such allegation, Scott decided upon the option best suited to his needs with the understanding that he did not have the option of continued employment. For that reason, we find that the doctrine of constructive discharge applies in this case.

Id. at 1128.

I find that Mr. Belt was not, as a matter of fact, presented a choice of voluntary versus involuntary lay off under coercion to choose one of them. He misconstrued the information given to him, and honestly believed that he would have no job after the RIFs. I find this to have not been established by a preponderance of the evidence.

Constructive Discharge Through Misrepresentation**:**

Mr. Belt alleges that he was misled, tricked or defrauded into voluntarily applying for the

IRIF, and that this constituted a form of coercion and, therefore, a constructive discharge. While there appears to be no definitive cases in any circuit deciding the issue of whether material misrepresentation can be the coercive act necessary to find constructive discharge, one case from the Western District of Pennsylvania touches on the subject. In *Baker v. Consolidated Rail Corp.*, 835 F.Supp. 846 (WD Penn 1993), an ADEA case, the employee claimed he was materially discharged when he voluntarily retired, because he relied on material information, allegedly false, in being told that the employer would be closing his department. However, the court decided that the employee was not constructively discharged. In the opinion of Judge D. Brooks Smith, when considering constructive discharge allegations, there must be some coercive action on the part of the employer. There must be "indicia of subtle coercion, such as threats of discharge, suggestions to the employee that he resign or retire, demotions or reductions in pay or benefits, [etc]." (*Id.* at 852) Judge Smith went on to say that "such conduct on the part of the employer would clearly *not* prove that the employee was involuntarily forced into early retirement, i.e., discharged." (*Id.* at 853) The employee's case failed, because he was unable to raise any factual issue regarding "fraudulent intent in connection with [the employer]'s alleged . . . misrepresentations." *(Id* .) The court said that the claim looked more like a cause of action for common law fraud than constructive discharge under the ADEA.

While I do not necessarily agree with all aspects of Judge Smith's rationale, he raises valid matters that must be addressed when issues are presented such as those of Mr. Belt in the present case. Such misrepresentations could provide grounds for a constructive discharge argument, if considered material and coercive by the court.

Basically, Mr. Belt argues that he was, in some manner, deliberately tricked or fraudulently led into, "voluntarily" pursuing the IRIF after the window period for the VRIF had closed, by the following alleged facts concerning the conduct USEC management, by: (1) making a prior determination that his Fire Protection Engineer job was to "go away;" (2) not revealing that fact to him before the running of the window period to apply for a VRIF; (3) rating him eighth of eight employees (the highest, and therefore the least likely candidate) who might have been IRIF'd if they did not voluntarily RIF; (4) not telling him, either that he was being rated, or that he had been rated so high that he would not be IRIF'd; (5) not telling him that he was doing good work and that they wanted him to stay: (6) while knowing all of this, telling him how to apply for the IRIF, and preparing the special documents to do so, and (7) not hiring him into a janitor's position, to fill out the one and one half years credits he needed for full retirement.

However, as stated above, I credit the testimony of Mr. Wimbrow and Pat Jenny that the only thing to "go away" was the title of his Mr. Belt's position, and that there was no reason for management to reveal that information, there being no other documentary or testimonial evidence that would tend to contradict their testimony.

While I have examined the "competencies" utilized to rate Mr. Belt for possible IRIF, and take issue with performing such a rating on bases different from those being utilized in the mid-

year evaluation process,[15] I also credit Mr. Wimbrow's testimony on the ratings, which is particularly credible as the ultimate result had Mr. Belt as the highest of those eight rated, and thus unlikely to be IRIF'd. Frankly, I believe, consistent with Mr. Wimbrow's testimony, that Belt probably would not have been IRIF'd.

However, the problem of Mr. Belt's knowledge of the "clandestine" (my term) nature of the layoff ratings process does cause me to question the matter, and might have caused a different result if Mr. Belt had gone the distance, and waited for an IRIF decision that resulted in his own RIF. It is my opinion that the adoption of a clandestine rating system for layoff, that is in any manner inconsistent with an existing evaluation system for promotion, termination, pay or other purposes, is immediately suspect. It loses its accountability, and is open to subjective manipulation, tainting the entire layoff selection process. Once having lost this objectivity, it is open for abuse, in selection of persons for layoff, as, I have stated, occurred in my Recommended Decision and Order *Douglas Jones v. USEC*, 2001-ERA-21, May 20, 2002.

More particularly, there is insufficient evidence to establish that Mr. Belt was coerced into volunteering for the IRIF. Had he not signed the IRIF documents, and not actually "involuntarily" subjected himself to an IRIF, I may not have ruled as I am doing in the present matter. By "jumping the gun" so to speak, and "voluntarily" signing the IRIF documents prepared at his request, rather than waiting for the involuntary IRIF, it will never be known how I or another Administrative Law Judge may have ruled on the straight IRIF. The fact is that the two methods of his possible departure after the VRIF window period had passed - his "voluntary" IRIF made at his request and the possible, truly "involuntary" IRIF, initiated at the behest of USEC management - would not have been the same.

Here, Complainant attempts to equate the "voluntary" nature of his IRIF with the truly "Involuntary" IRIF. The fact that Mr. Belt saw a document with his position eliminated after the window period for selecting a VRIF does not change this result. There is no evidence that any employees were shown documents that would have indicated what the new employee make-up at PGDP would be after the RIFs. In fact, as stated above, the documents verify that Mr. Belt was not on any IRIF list.

[15]Mr. Belt was inappropriately rated low in the category of "Integrity and Trust," as having a "lack of trust." (T 215). This would have been a consideration had he not approached management and been subjected to a truly "involuntary" IRIF, and where he did not, in fact, voluntarily sign the June 22nd documents. By virtue of the preceding discussion, it does not affect the result in the present matter.

Complainant's argument may be synthesized into this one sentence as stated in his brief:

> USEC violated the whistleblower provisions of the Energy Reorganization Act by permitting Belt to voluntarily participate in the involuntary reduction in force without providing him information to allow him to make an informed, intelligent, voluntary choice. (Complainant's Posthearing Brief p. 21)

The essential problem is just that: Mr. Belt did "voluntarily participate in the involuntary reduction in force" on the same basis that everyone else did. There has been absolutely no evidence presented that any other employee had additional information about what the post-RIF complexion of PGDP/USEC would be, before the VRIF was announced, or even after it, until Belt actually learned that his position was being eliminated. To have done so would have placed him in an advantageous position, thus subjecting USEC to charges of discrimination from the other employees subject to the RIFs. Without evidence of discriminatory treatment in maintaining this position, USEC has met the burden of having presented clear and convincing evidence of its business explanation for the action that has not been refuted by a preponderance of the evidence.

I simply cannot draw the inference from this state of the record requested by Complainant; namely, that Respondent violated the Act, either by not informing him that his position was being eliminated or that there might have been another position for him at the PGDP for him to fill at that time, or by the withholding such information on the status of Mr. Belt's employment. To the extent that the question remains as to whether they deliberately withheld such information to induce him to voluntarily submit a request for an IRIF, I credit the testimony of USEC witnesses that they did not do so, as a matter of fact on the record as a whole, and that Mr. Belt has, therefore, not established a violation of the Act as a matter of law.

I find that USEC did not coerce Mr. Belt into making his decision to voluntarily submit his request for an IRIF, or to sign the papers on June 22, 2000, or thereafter, which were necessary for that request to be effective on July 14, 2000. The documents so state, but I want to affirm that I would not hesitate to find that the wording of those documents was coerced and contrary to what was happening, and to therefore find a violation, if that what was I had concluded from the evidence on the record as a whole. I cannot make such a finding.

I find that Respondent has established by clear and convincing evidence that it had a legitimate, nondiscriminatory reason for Mr. Belt's IRIF voluntary request for it; that he has not presented substantial, credible, evidence that his layoff was motivated by an improper management intent, and that, although he would not have been laid off anyway, he definitely would not have been IRIF'd without his voluntary request to do so. Complainant has failed to establish by clear and convincing evidence that the reasons for the layoff were not legitimate or discriminatory.

7. Layoff Reasons as a Pretext:

Once the respondent articulates a legitimate, nondiscriminatory basis for its action, or establishes it under the ERA, the focus shifts to the issue of whether such basis is merely pretextual and that the respondent's action was based on a discriminatory motive. The complainant,

> may demonstrate that the reasons given were a pretext for discriminatory treatment by showing that discrimination was more likely the motivating factor or by showing that the proffered explanation is not worthy of credence . . . In order to determine that [the complainant] has established discriminatory intent in regard to this adverse action by the [respondent], however, "[i]t is not enough . . . to disbelieve the employer; the fact finder must believe the plaintiff's explanation of intentional discrimination."

St. Mary's Honor Center, supra, 113 S.Ct. at 2749, 2754.

I find that there is insufficient evidence to establish that USEC's acceptance of Mr. Belt's voluntary application for an IRIF was a pretext for terminating him for his protected activity, for the same reasons that have been set forth regarding the confusion that he experienced over what had been said about his job going away: he misinterpreted what was being said about the elimination of his job title. He provided insufficient evidence to establish that this was a fraudulent trick of management to get him to request the IRIF, for the reasons otherwise discussed herein.

Conclusion:

Here, I find that Mr. Jones was an employee of an employer covered by the provisions of the ERA; that he was a member of the class employees protected by the "whistleblower" protective provisions of the ERA; that he was engaged in protected activity as the employee who managed to call attention to the safety implications involved in his 84 ATRs; and that he was laid off as a possible act of retaliation for the issues that he raised about these matters. However, the business justification of Respondent USEC for approving the voluntary request of Mr. Belt for the IRIF, or the layoff, were established by the Respondent by clear and convincing evidence, and did not constitute a pretext for the real reason that he claimed he was terminated, his protected activity. In short, Respondent has, demonstrated "by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior."

As a consequence, Complainant has not established, by a preponderance of the evidence that his layoff was directly and intentionally motivated, at least in part, by his health and safety complaints, so the complaint(s) must be dismissed.

Therefore, it is recommended that the following order be entered on behalf of the Secretary of Labor, to be effective immediately if no petition for review is filed, or upon an applicable ruling by the Administrative Review Board if review is sought under the provisions of 29 C.F.R. §§24.1(c)(1).

IT IS ORDERED that the complaints of Vernon Belt are dismissed, for the reasons set forth in this recommended decision and order.

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THOMAS F. PHALEN, JR.
Administrative Law Judge

NOTICE

This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §§ 24.8, a petition for review is timely filed with the Administrative Review Board, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief, Administrative Law Judge. See 29 C.F.R. §§ 24.7(d) and 24.8.